Yale Journal of Law & the Humanities

Volume 1
Issue 1 *Yale Journal of Law & the Humanities*

Article 5

January 1989

Family Feud: A Response to Robert Weisberg on Law and Literature

Richard H. Weisberg

Family Feud: A Response to Robert Weisberg on Law and Literature

Richard H. Weisberg

While linked, despite our last names, to no other common ancestor than Adam (for whom he begrudges me my admiration), Robert Weisberg and I agree on so many aspects of Law and Literature theory that we may be said to have familial ties of the interdisciplinary kind. Like my namesake, I have studied literature to the ultimate degree; like him, I have taught the subject to undergraduates and graduate students in literature. So neither of us, as does the occasional upstart, comes to this multifaceted relation anxious only to spew out recently digested (and hence often bilious) matter, usually projected towards others' dust.

Nor in discussing (as henceforth) "Weisberg's work," "Weisberg's approach," etc., can I wholly avoid the sense of self-critique or mirror-watching that must earlier have affected those near namesakes Fiss and Fish in their famous disputations. Like Fish to constitutional theory, Weisberg brings to a kind of settled discourse (a decade of Law and Literature writings) insights otherwise overlooked by the field's practitioners, yet does so with an enthusiasm that barely masks his sympathies for that discourse.

Still, Weisberg creates here a skeptical persona. Fearful particularly of what he ubiquitously calls "sentimentality"—a word used at least 20 times in this relatively short article—Weisberg seeks to distance himself from enthusiasts for the fledgling field who may have falsely inferred its universal significance. This fear and trembling before the seemingly powerless sister narrative discipline of literature speaks volumes, and helps explain why so many legal academicians without Weisberg's literary training recoil at the "very idea of law and literature" (John Ayer's titular phrase in a self-revealing recent essay in the *Michigan Law Review*).

In addition to flagging the dreaded "sentimentality" issue (of which more later), Weisberg displays an antipathy for ornament that leads him to say strange things about Cardozo and Blackstone, among others, and to ignore the teachings of the neo-realist master, Karl Llewellyn. These two *Leitmotifs* ally Weisberg with the non-literary legal professoriat, but they seem out of sync with many of his other positions. So, too, does a spotty reliance upon at least one plank of our generation's mandatory postmodernist platform: a distrust of all absolutes, and a sense that a suc-

cessful or obvious attack on one "foundationalism" necessarily disposes of all. But here, Weisberg's clear attraction to structuralism and distaste for systems grounded (like that of the gentle deconstructionist, James Boyd White) in their appreciation for complexity alone, eases the jarring dissonance among various voices he assumes.

Indeed, Weisberg vs. Weisberg becomes Weisberg to the *n*th power, when he asserts that this interdisciplinary movement must establish its "subversive" *bona fides*. I concur. Neither discipline will emerge refreshed and redirected unless Law and Literature points out and exemplifies the iconoclastic spirit in which both narrative projects must now be approached. But this is true not as an abstract statement about interdisciplinary incursions on law (otherwise, what has Law and Economics added that was not already set out in Holmes, Learned Hand, and even the series of cases marked "Unreasonable Risk" in the Prosser Casebook of 1967?); the need for discomfiture arises because, as Weisberg puts it, "the supposedly different forms of discourse in a culture are linked at some level in symbiosis or conspiracy."[1] Put directly: if Law and Economics grabbed center stage for restating as a comforting absolute what most judges had common-sensically always known, Law and Literature will emerge by calling into question the basic assumptions of our central discursive cultures and at the same time by pointing towards a more overt and ethical use of institutional language.

Here, as in other domains, however, Weisberg strikes me as right for the wrong reasons. First, he misperceives the phenomenology of this subversive interrelation. Like some Critical Legal Studies people, and like Clifford Geertz (whom he cites), Weisberg seems to feel that a "reconstruction of the standard explanation of behavior 'sits rather poorly with traditional humanistic pieties' ";[2] but this is only true for periods in which established beliefs are breaking down for reasons *other* than intellectually disquieting attacks upon them. When the Pope has to say, as he did recently when visiting Waldheim in Austria, that "[i]t would be unjust and not truthful to charge Christianity with these unspeakable crimes [of the Holocaust],"[3] it does not take a law review article to bring down conventional structures. Law, literature and religion are already in stress; the aptness of Law and Literature must be defined in terms of subversion only because, in our generation, the predominant institutions of narrative discourse have already perceived their own degradation. The "pieties" are disappearing under their own (truly "sentimental") flabbiness; the acute interdisciplinarian follows, rather than leads, cultural phenomena. Thus,

1. Robert Weisberg, *The Law-Literature Enterprise*, 1 Yale J.L. & Humanities 1, 51 (1988) [hereinafter Robert].
2. *Id.* at 4.
3. *John Paul Meets with Austrian Jews*, New York Times, June 25, 1988, § 1, at 3, col. 1.

incidentally, the "Hey, look at me!" iconoclasm of other recent movements in law has not attracted Law and Literature scholars.

Yet the reporter of bad tidings (and the identifier of different, more just discursive systems) *must be* an interdisciplinarian, precisely because the traditional disciplines, almost by definition, will be the last to locate and articulate a set of beliefs that runs the slightest risk of leading to their dissolution. Hence Weisberg's apparent unwillingness to locate the source of this subversion within the literary text itself. (He almost seems willing to accept Richard Posner's curious claim that the modern novel's fascination with legal procedures may be dismissed as "adventitious," although he contradicts himself in his fine discussion of Kafka.) Weisberg resists, paradoxically, the view that—like literature in its recent relationship to philosophy—law may fruitfully turn to a sister set of texts in order to understand its own fatal limits. We do not "produce" a conceptual wrench;[4] we identify its pre-existing locus.

To return now to Weisberg's fear of "sentimentality," I believe it arises from his underlying resistance to the literary text itself more even than to those Law and Literature thinkers who seem self-congratulatory or smug. This resistance appears on two levels, one normative and one epistemic. The former involves the accurate assertion that some (repeat, some) Law and Literature work seems designed primarily to bring the lawyer back in touch with his or her emotional (as opposed to, say, rhetorical or ethical) side. Against this tendency, Weisberg constantly posits a normative assertion, typified in these repetitive phrases: "this identification through literature of human voices and sensibilities in legal proceedings is not *or should not be* a matter of any great discovery; . . . this point . . . hardly *should require* recurrence to the great works of the Humanities. . . . Lawyers or law students are or *should be* perfectly aware even from conventional case analysis that human pain underlies doctrinal abstraction. . . . To say that we need to read works of imaginative literature to see this point is odd. It *should be unnecessary*. . . ."[5]

Now no one in the field today would disagree with the claim that those who emphasize through literary texts the emotional and irrational aspects of law *should not have to do so*. But this normative claim is of little analytical value. Literary criticism performed carefully and knowledgeably by law professors with a modicum of training not only can but *must*—at least in 1988—fill a near void of pedagogical and scholarly interest in the irrational side of human behavior. (Weisberg implicitly concedes, as his paper progresses, that literature is a privileged place for knowledge of the irrational, superior—as Nietzsche first observed in his remarks about Dostoevski—to the newer "sciences" of psychology or soci-

4. Robert at 4.
5. *Id.* at 17-18 (emphasis added).

ology. The claim is particularly valid for lawyers, because the demonstration of irrationality in literature is constantly linked to *narrative* acts, either the author's or the characters'. Where, as in so many modern novels, law itself is a pervasive, overt theme, the literary linkage of irrationality to legal discourse becomes a unique source of learning for lawyers.) There exists no other locus of learning about such central legal irrationalities as the "otherness" of many clients (*The Stranger*); the subjective bases of seemingly objective institutional acts (*The Merchant of Venice, Billy Budd, Sailor, The Brothers Karamazov*); the tactical importance of illogical behavior such as silences, physical gestures or deliberate departures from linear reasoning (*Crime and Punishment, Great Expectations*); the dangers of legalistic over-analysis and abstraction in the face of the obvious (*The Fall* and a non-novelistic precursor, *Hamlet*); the phenomenology of thinking itself as resulting from sensory, rather than logical, factors, and the ensuing relationship of thinking to the expression of the thought (*The Floating Opera*).

We must teach and think about these texts because, here and now, they are the best medium to instruct ourselves and our students about what we do. I need not dispute Weisberg's claims that to suggest we must read fiction implies that lawyers are "doltish"[6] or that some of these elements are picked up by osmosis from occasional casebook analyses or in practice (all of his examples, however, relate to litigation experience). If we are "doltish," we are no more so than our peers. But *we need* this learning in order to practice and (more importantly, at least for me) in order to understand what our assumptions are and what we do.

Weisberg's normative claim seems naive in two other ways. First, he ignores the work of Allan Bloom, E.D. Hirsh and others, work that suggests that people today do not learn, much less take with them "fully absorbed"[7] the lessons of literature. My nephew is about to graduate from the University of Pennsylvania and tells me that only my influence (and no requirement) led him to study formally any fiction whatsoever in earning his B.A. Lawyers themselves, as I note elsewhere,[8] had—until this movement made some strides—gone beyond apathy to actual aversion when it came to reading fiction. A residue of unsupported skepticism remains even, as I have been observing, in Weisberg's sophisticated and largely sympathetic paper.

Second, Weisberg fallaciously equates (somewhat along the lines of Walter Gellhorn in a 1982 number of the *Journal of Legal Education*) literary sensitivity to softness. That bias emerges particularly (and ironically) in Weisberg's attack on Cardozo. Annoyed by Cardozo's use of or-

6. *Id.* at 18.
7. *Id.*
8. *See* my *Coming of Age Some More: Law and Literature Beyond the Cradle*, 13 Nova L. Rev. 107 (1988).

nament, but apparently accepting the rhetorical aptness of so many of his opinions, Weisberg declares:

> As a first cut, we can generally align linguistic precision with sensitivity to moral value, and abstraction to the opposite. But this is not a compellingly necessary alignment. It . . . ignores the possibility, at least on different facts, of highly poetic descriptions of conflicts that create sentimentally congratulatory pictures of ancient rights of property.[9]

This straw man will not walk. Admirers of Cardozo always (and until the present moment[10]) point to *Palsgraf* as one of many cases in which linguistic precision and ornament produce justice (in terms of efficiency and morality) in favor of a corporate right of property. We disagree with John Noonan (as does Weisberg) that Cardozo becomes evil every time he finds against an injured plaintiff or a criminal defendant. Yet the rhetorical gift remains constant. Weisberg inverts the theoretical construct; we move from admiration of Cardozo's ethics to a gradual awareness of how his rhetoric serves those values.[11] Furthermore, I find (also to my surprise) that Weisberg dislikes my treatment of Rehnquist, even though that treatment not only provides the discursive linkage he otherwise seeks[12] but also because it precisely raises the question of how clever and even eloquent rhetoric can lead to unjust results.

The Law and Literature task here is to revivify the lawyer's grasp of rhetoric, but then to undertake the highly difficult task of associating an esthetic or technical tool like rhetoric with a moral and abstract realm, which is ethics. Once again, here, the literary text is the central medium of learning (despite Weisberg's unproven assertion that "modern literature . . . has little to do generically with formal rhetoric"—how could it not?, see, e.g., Camus's *The Fall*), for it imposes the esthetics-ethics discussion upon the reader. No wonder that Posner desperately labels the modern novel as "adventitiously" about law while still approving the renewal of interest in stylistics. He does not want to study the underlying link between rhetoric and values. But Weisberg does, so his discussion in IIIA and IIIB, and his rejection of Cardozo, seems very odd.

Ornament belongs with law. It is an element of legal rightness, and it can also be (as with the Rehnquist opinion I examined) a factor in legal wrongness. Even the neo-realists, at their most literary moments, recognized this. Hence, Llewellyn:

> Thus the only esthetic rule which I recognize about adornment in

9. Robert at 38.
10. *See* my *Judicial Discretion, or the Self on the Shelf*, 10 Cardozo L. Rev. 105, 108 (1988).
11. *See* my *Law, Literature and Cardozo's Judicial Poetics*, 1 Cardozo L. Rev. 283 (1979).
12. *See supra* note 1 and accompanying text.

> relation to function is that adornment is best where it can be made to serve function, and is bad when it interferes with function; beyond that, the quest for richness of beauty and meaning seems to me a right quest. You may call these prejudices; to me, they are considered values. But whether you like them or not, in general, you will have difficulty in dodging their applicability to things of law.[13]

Only an obstinate set of unexamined presuppositions would oppose ornament just because it is ornament, and I do not believe Weisberg exhibits that obstinacy. Yet, again, there is skepticism in the face of what Llewellyn (now speaking directly of Cardozo) calls the "light-giving answer." Our ponderous age finds the economic "graphic" more re-assuring than the literary flash of insight; but judgment cannot be so systematized.

"Sentimentality" is thus partly revealed as a set of beliefs held (or dutifully represented) by Weisberg and not necessarily to be found in much Law and Literature discourse. I return to the "epistemic" level of resistance to our work that I mentioned earlier. Weisberg makes at least two claims about knowledge, one of which I find unconvincing and the other extremely helpful. He generally seems to feel that a proposition—however general—is disproven by any single example that tends to work against it. Thus the Law and Literature belief that the literary voice is the best contemporary jurisprudential source would be undermined by the very correct observation (through the work of Regenia Gagnier and others) that *some* literary voices are themselves corrupt.[14] Or the related, and extremely well crafted, section on T.S. Eliot, employed by Weisberg to "prove" that a "Ciceronian unity of ethics, politics, and aesthetics . . . points us toward a world that we cannot have or should not want."[15]

But these assertions, unless they exist in a purely linear frame that utterly denies both choice and the cyclical nature of knowledge, do not disprove the generalizations asserted by Law and Literature. Our task, of course, is to *choose* the texts that proffer (often only covertly) the subversive voice we find representative of the age. We begin our study of the modern law-related novel with Flaubert and Dostoevski rather than with Balzac and Dickens, and we do so because the former integrate narrative ambiguity and non-omniscience with the anti-rationalistic and word-skeptical themes they so brilliantly produce. We continue with Melville and Camus because, again, the manner of communication exhibited in their narratives about law subtly reflects their iconoclasm about the seemingly logical, irrefutable nature of legal discourse. Among modern writers continuing the thematic and structural fascination for law, we make choices as between E.L. Doctorow, for example, who is in the tradition just dis-

13. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. Chi. L. Rev. 236 (1941).
14. Robert at 22.
15. *Id.* at 12.

cussed and, say, Louis Auchincloss, whose self-satisfaction emerges from every word he writes.

So, on the larger level, I might first question whether the Ciceronian unity Weisberg dislikes is *inevitably* beyond our reach. Do ethics and esthetics join only at the beginning of cultures, as they did in our nation's first half-century? Then how can we explain the force, beauty and durability of the Napoleonic Codes (1804-08), which still guide numerous legal systems and which Stendhal read every night for their sheer (Llewellyn-like) esthetic power? Those, no more than the Mosaic codes, were the product merely of simpler, hopelessly anterior cultural conditions. To reason that our present legal environment is too individualistic to allow for the merger may be acceptable; but such reasoning does not prove anything as a teleological matter.

Nor does Weisberg seem to me to prove that we should fear such a Ciceronian renaissance. The apostrophe to Eliot only indicates that our (neo-classical, not romantic![16]) search for a unity of ethics and esthetics requires us to move beyond postmodernist relativism and to *name* (Adamically) those values that we support and those that we reject. The Fascistic ordering, so rightly raised and rebutted by Weisberg, is not the sole ordering by which a newly classical culture might define itself. Postmodernism's peculiar fallacy—to reject epistemology because this century's most horrifying events emerged from an absolutist system—distracts us from thinking about totally different (i.e. just) systems and forces us to disjoin the word from the referent precisely when we most need their reunification.

One absolutist system's rottenness, in other words, does not prove the corruption of all absolutes. I think Weisberg realizes this, and his excellent discussion of structuralism (see, e.g., footnotes 175-178) indicates an uneasiness with postmodernist non-referentiality. The literary text, again, is the locus for understanding not only the yearning for absolutes in most people (understood and implemented, it seems to me, by Law and Economics theorists) but also the kinds of absolutist systems to embrace or reject. When the Grand Inquisitor discards Jesus, Dostoevski indicates not that all systems are bad, but more precisely that any system that must reject goodness in order to operate on earth is irredeemably corrupt. Other Dostoevskian, law-related texts take the hint and indicate clearly[17] which

16. Posner's assertion that I am a "romantic" makes sense only in light of Weisberg's brilliant debunking of the Judge's "maturity" theme. I will respond to Posner's claims in my forthcoming review of his book, in the Stanford Law Review (July 1989).

17. Clarity, of course, is a relative concept. Towards the end of his IIIB, Weisberg seems to suggest (through Bentham) that legal rhetoric would be better if people eschewed metaphor and just said what they meant. Although his point is far from clear, I might answer by suggesting that most crucial information can only be communicated "considerately". *See* my *The Failure of the Word*, chs. VIII and IX.

systems indeed *do* merge earthly order and spiritual goodness to arrive at a workable norm of terrestrial justice (see, e.g. Malamud's *The Fixer*).

As I have suggested, however, Weisberg raises the more helpful, hermeneutical question of why literature alone (or even best) becomes a contemporary source of understanding. Here he tracks the argument of Edward L. Rubin in a very recent *Michigan Law Review* piece.[18] Admitting, as Weisberg does, that legal scholarship needs to become more self-critical and aware of its own inherent values, Rubin uses hermeneutics (one of Law and Literature's contributions to recent legal discussion) to indicate that a "broader vision of interpretation" is required, and that

> the idea that scholars should approach legal texts armed with a set of literary techniques is . . . the antithesis of modern hermeneutics. Rather, the scholar's task is to relate the text to the totality of our historical and cultural experience. Questions about the political function of the text, its historical setting, and its practical effects, are as relevant as the judge's use of legal reasoning. Hermeneutics, in other words, is a theory of understanding that applies to the entire range of issues raised in standard legal scholarship. It seems fair to say that it refuses to treat literature as literature, in the belles-lettres sense, and it certainly would not recommend that legal decisions be treated in that fashion.[19]

Following Gadamer to some extent, but resisting his allegiance to text, Rubin (in the same vein as Weisberg in Part IIIC) raises the point that literary theory itself might deny the notion that literature is particularly relevant to law. The point gains credibility when one notices that literary "theoreticians" not only never discuss individual literary texts, but delight in "confessing" that they have not even read the central fictional narratives of our culture. I agree with Weisberg that the "interpretation" debate has yielded little, but again I think the Weisberg-Rubin conclusion is right for the wrong reasons. Indeed, it is precisely the programmatic deletion of literary texts from the recent debates that has so impoverished them.

In Gadamer's sense, the "wider text" for understanding law needs to be literary, at least at this juncture, because most of the inquiries itemized by Rubin gain focus only within those texts. Weisberg is absolutely right, therefore, in suggesting early in his paper that the Law in/Law as Literature dichotomy no longer needs to hold sway.[20] We learn about meaning best *not* from theoretical sources but instead from those very narratives that form the heart of 19th and 20th century fiction. The hermeneutic

18. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich. L. Rev. 1835, 1877 (1988).
19. *Id.*
20. Robert at 4.

tradition that counsels the widest arena for epistemological inquiry, and the keenest ability to criticize our interpretive stance as we are seeking understanding and meaning, urges us in this moment of our "thrownness" to approach literary art. As I have discussed elsewhere,[21] the "great books" that so delight in depicting legal procedures set forth a hermeneutics that is fully responsive to our postmodernist concerns without accepting at all a postmodernist approach to meaning. A reader, sequentially, of *Crime and Punishment, The Brothers Karamazov, Billy Budd, The Stranger, and The Fixer* (the primary "procedural novels," as I have called them) will be uniquely situated not only to understand legal interpretation but also to challenge the assumptions that interpreters such as legal academics bring to their enterprise.

Law *in* literature and law *as* literature have been unified, just as esthetics and ethics yearn constantly for unity. Ours is the task, in my opinion through what Rubin calls "belles lettres," to make the choices that distinguish unities one from the other, and that bring us to a Weisberg-Weisbergian fusion of these "supposedly different forms of discourse."

21. Robert Weisberg discusses these essays at 33-34, nn. 113 & 114.